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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO. 40 OF 2004**

Namdeo Bhimrao @ Laxman Mane ... Appellant

V/s

The State of Maharashtra ... Respondent

Mr. R.S. Kate for the appellant.

Mr. P.S. Hingorani, A.P.P. for the respondent.

**CORAM: V.G. PALSHIKAR &**
**SMT. NISHITA MHATRE, JJ.**

**DATED: 12TH DECEMBER, 2006.**

**ORAL JUDGMENT (PER SMT. MHATRE, J.)**:

1. This appeal is preferred against the conviction and sentence of the appellant by the Additional Sessions Judge, Baramati, in Sessions Case No. 23 of 2002. The accused has been convicted under Section 302 of the Indian Penal Code for having murdered one Ashabai Namdeo Mane. The accused and the victim were residing at Zargadwadi, Tal. Baramati, as man and wife. The accused had a legally wedded wife and children who were residing in another village. According to the prosecution, the victim and the accused used to quarrel on various grounds very often. The accused alleged that the victim was visited by various persons in his absence, and that she had developed illicit

relationships with them. On 15.1.2002 at about 3.00 p.m. after making these vile allegations against the victim, the accused latched the door of the house, doused the victim with kerosene and set her ablaze. According to the prosecution, the accused then fled from the scene of offence. The prosecution has contended that the victim sustained burns on both her hands, thighs and chest. She shouted out and her neighbour rushed to her aid and extinguished the fire by pouring water. The victim then went to the hospital alone by a S.T. bus where she admitted herself for treatment. The statement of the injured victim was recorded by the police station officer who rushed to the hospital on being informed of the incident. This statement of the victim was treated as the F.I.R. and the crime was registered against the accused. The Taluka Executive Magistrate recorded a dying declaration between 5.00 and 5.30 p.m. The investigation was then completed by the police by drawing the required panchanamas. Articles such as, a plastic kerosene can, a match-box with matchsticks, half burnt matchsticks and pieces of bangles were seized from the scene of offence. The victim succumbed to her injuries on 21.1.2002 about 6 days after the accident, although she had sustained 91% burn injuries, according to the medical officer treating her. On the victim’s death, the accused was also

charged under Section 302 of the Indian Penal Code. The trial of the accused was committed to sessions. The Sessions Court, Baramati had convicted the accused under Section 302 of the Indian Penal Code and sentenced him to suffer imprisonment for life.

2. In order to sustain the charge against the accused, the prosecution has examined seven witnesses. Before dealing with the evidence of each of these witnesses, it would be relevant to refer to the dying declarations at this stage. Exh.27 is the dying declaration which is recorded by the police head constable, PW-6. In this statement, the victim has alleged that the accused suspected that she had illicit relations with several men and he, therefore, doused her with kerosene and set her ablaze. This statement allegedly bears the thumb print of the victim. It has been recorded at about 3.00 pm. It is endorsed by the medical officer who has certified that the statement was recorded in his presence and that the victim was conscious. The dying declaration at Exh.21 which is allegedly recorded by PW-3, the Special Executive Magistrate is in a printed format. The reason given by the victim in this dying declaration for sustaining the burn injuries is that, her husband was drunk and he doused her with kerosene and set her alight. This statement is recorded at 5.50

pm. It is endorsed by the medical officer. His signature is appended below a printed statement to the effect that the patient was fully conscious before and during the time when the statement was being recorded. Thus a perusal of both these dying declarations indicate that the reason given by the victim for having been set ablaze is different in both the statements. In one, she has spoken of the accused having suspected her of illicit relations with some other persons and on the other hand she speaks of the accused being drunk and setting her ablaze. In such circumstances, it would not be appropriate to rely on either of the statements of the victim. Moreover, the statement which is at Exh.27 and which is recorded by PW-6 has not been accepted by the Sessions Court. This is because the medical officer had not examined the victim before her statement was recorded. The deposition of PW-6, the police constable, who recorded the statement shows that, it was recorded in the presence of the doctor. He states that the victim's finger were burnt and that she had sustained 90% burn injuries. He has also admitted in the cross-examination that her speech was incoherent. It is, therefore, rightly held by the Sessions Court that it is unsafe to rely on this dying declaration. The other dying declaration which was recorded two hours later, also, in our opinion, cannot be accepted. If

indeed the victim had sustained 90% burn injuries as was stated by the medical officer treating her, it is unnatural that she would be in a position to talk coherently after two hours. According to the Special Executive Magistrate, the doctor treating the victim told him that she was in a position to have her statement recorded. The doctor, accordingly endorsed the dying declaration. As stated earlier, the reason for setting her ablaze given by the victim in this declaration is quite different from what she has stated in the earlier declaration. In Exh.21 she has stated that the accused had set her ablaze in an inebriated condition. PW-3, in his cross-examination has admitted that the endorsement of the medical officer was printed on the form on which he recorded the dying declaration. The medical officer had administered pain-killers and other medicines to the victim. A relative of the victim was sitting near her. He has admitted that the doctor did not give any assurance to him regarding the mental state of the victim when the statement was being recorded. The second dying declaration was at Exh.21 also, therefore, cannot be accepted.

3. It is well settled that before the dying declaration can be accepted, the Court must ascertain that the victim was examined by a competent medical officer prior

to the recording of the statement. There must be an endorsement to the effect that the mental condition of the victim was stable and that she was in a position to have the statement recorded. No relatives of the victim should be present when the statement is being recorded. Even if in the present case we ignore the dying declaration at Exh.27 as has been done by the Sessions Court, the one at Exh.21 does not inspire any confidence. None of the aforesaid requirements have been observed by the Special Executive Magistrate, PW-3 while recording the dying declaration. Therefore, both the dying declarations at Exh. 27 and Exh. 28 must be discarded.

4. That leaves us with the oral testimony of the prosecution witnesses. PW-1 and PW-5 who are neighbours of the accused have been declared hostile. Their testimony is, therefore, not of any avail to the prosecution to prove its case. PW-2 is the panch witness who is also declared hostile. PW-4 is the doctor who has treated the deceased when she was in hospital. She states that the victim had sustained 80% burns. She has deposed that the police recorded the statement made by the victim in her presence when the victim was fully conscious. She has admitted that, when the victim was admitted to the hospital she was

administered IV fluids and injections. She has admitted that, in case of 80% of injuries of burns or more, the patient can go into shock and in that case his speech can become incoherent. The medical officer has also admitted that the police did not enquire with her about the victim’s "consciousness or otherwise" before recording her statement. She has stated that the police obtained her signature only after the statement was recorded. Significantly, this witness states that the victim came alone to the hospital with severe burns and was admitted for treatment. It is inconceivable that the victim who sustained severe burns to the extent of 90% would be in a position to board a bus (as mentionedin EX.27) and get herself admitted to hospital all by herself.

5. PW-7, the investigating officer has proved the spot panchanama and seizure panchanama. He has mentioned the articles seized from the spot. He has arrested the accused after the crime was registered.

6. The entire basis of the prosecution case are the dying declarations. Once we have found that these declarations which are recorded, are contrary to each other, and cannot be accepted for more reasons than one, we cannot agree with the reasoning of the Sessions

Court.

7. The appeal is allowed. The judgment and order of the Sessions Court is, therefore, set aside and accused be set free, if not otherwise required.

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